

Regulation of Lawyers: Problems of Law and Ethics

Sixth Edition

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In loving dedication to
Gillian Gillers
and
Heather Gillers

les enfants du paradis

Why It Matters: A Preface for Students

The ideas in this book and the course for which it is assigned will govern all of your professional life. Here you learn the rules you have to live by and the consequences if you ignore them. Other courses teach lessons that bear on your clients' problems more directly. This course is for you. Unless you work in the areas of legal malpractice, lawyer discipline, or the like, you and not your clients will be the immediate beneficiary of what you learn here. Your clients will be indirect beneficiaries.

The subject of this course can be discussed from at least three perspectives.

At the precipice of your career, perhaps most important are rules that constrain your professional behavior. In such areas as competence, fees, marketing, confidentiality, conflicts of interest, negotiation, and the attorney-client relationship, what may you do, how may you behave — with confidence that your conduct will not land you before a disciplinary committee, lead to a civil lawsuit, invite court sanction, forfeit your fee, or damage your reputation?

Even to ask this question should be sufficient to forewarn you that the “ethics” in legal ethics is not merely about being a morally good person. It is also about being a professionally safe lawyer. For the fact is that the law business is heavily regulated, like banking, securities, and pharmaceuticals. The regulations are becoming increasingly complex. They have already led to creation of a new phrase — the law governing lawyers — lest anyone is fooled by the word “ethics” into believing that the subject is mostly how to be liked or respected.

You make two mistakes at your peril. First, do not believe that the right way to act — toward clients, courts, adversaries, or colleagues — will be intuitively obvious. Sure, sometimes it will be. But no one needs to teach you not to lie or steal in professional life, and certainly not in 1,000 pages. The rules here are often not self-evident; they may even be counterintuitive and can be exquisitely subtle in their application. Second, do not assume that the law office that hires you will provide all the protection you need against missteps. Good law

offices do have systems to detect and avoid improper conduct. But they are not perfect, and, anyway, the duty to act properly is generally not delegable. The individual responsibility of each lawyer cannot be entrusted to a boss. In the end, you're on your own.

The second perspective from which to view the law governing lawyers is the relationship between the profession and society. The rules that lawyers impose on themselves and that are imposed on them, taken together, help define the nature and work of the entire profession and therefore the behavior of our legal institutions and the quality of our social justice.

For example, a rule that allows lawyers to advertise will influence the conduct of individual members of the bar. But it may also affect the size of legal fees and whether or how large categories of people use lawyers. Similarly, a rule that prohibits or requires a lawyer to reveal certain kinds of information about a client in order to protect others from harm will control that lawyer's own behavior, but it may also affect which client populations use lawyers, and what information clients are willing to give them. In short, nearly every rule, whatever its source, has social and political consequences beyond any single representation or practice, although there is often fierce disagreement over what these consequences will be and whether they should be avoided or encouraged.

As you are about to go off into law practice, you may be more interested in such questions as "How do I behave?" and "How can I stay out of trouble?" than in asking, "What are the consequences to society and justice if one or another version of a particular rule is applied to America's more than 800,000 practicing lawyers?" Still, the last question is important and, if not as immediate, will surely arise in the course of your professional life. Many readers of this book will someday be in positions that require them to address the broader question. It should come as no surprise that practicing lawyers have intense feelings about the issues in the area of lawyer regulation. They see intuitively how decisions about them can alter their professional lives.

Both kinds of questions, but more so the second, engender different, and sometimes vehement, responses from practicing lawyers. Why? In part, because to answer them we must call upon political and moral values more fundamental than the "ethics" that inform various codes. And, of course, the political and moral values of different people may differ fundamentally. In addressing these questions, we should try to be honest about the interests we mean to protect. Those of society generally? The legal profession's? The interests of lawyers in practices like the one we have or expect to have? Those of the particular client population we serve? Our firm's? Our own? Responding honestly may not entirely endear the bar to the public, but it may help mitigate what often appears to be an ingrained Amer-

ican suspicion, if not hostility, toward lawyers. Tracing that attitude in history and the popular culture is Leonard Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405 (1999).

Law school and law practice, it is sometimes said, encourage more rather than less self-interestedness in answering the questions raised here. In transition as you are, your answers to many of them will likely vary from what they would have been before you entered law school and will likely be still different five years after you graduate.

I wrote that rules governing the practice of law can be discussed from three perspectives. I have so far listed two. The third is the effect of lawyers' work on the people who do the work, that is, the effect of role on self. For example, a rule that requires silence though it means that another will suffer injustice will take its toll on those who must obey it. As men and women, we consider it laudable to speak up to prevent injustice to others. As lawyers, we may be forbidden to do so. How can we reconcile these two positions, not intellectually or theoretically but personally, within ourselves? A similar point can be made about the rule that requires lawyers diligently to pursue the lawful goals of their clients, even if these goals (or the legal strategies used to achieve them) offend the lawyer's values. Or consider the oft-cited schism between the qualities of personality that law office culture tends to reward and the ones encouraged in personal and family life. Do you have to learn behavior in order to survive in professional environments that will make you downright unpleasant in social and familial ones — unless you also learn how to "leave it at the office"? One thinks of the common retort of a lawyer's lay relatives: "Oh, stop talking like a lawyer!"

Many topics in this book lend themselves to discussion of the effect of role on self. I hope you are able to address this issue in class, but certainly they are worthy of self-reflection throughout your career, starting now.

... AND MY CASEBOOK "PHILOSOPHY"

This is the sixth edition of this book. I started work on the first edition in 1982. Between editions I spend an hour or two each week planning for the next one. You get to thinking a lot about what a casebook is and can be when you live with one for so long.

The book's primary function is to provide information, but that's just the beginning. The minimum editorial task would allow me to pick some good cases and other materials, edit them, order them

logically, add interstitial notes and questions, and put the product between covers. Voila! A casebook.

Of course, one must begin this way, but if nothing more were possible (even if not required), I doubt that I would have continued at it this long. I'd grow bored. Luckily, more is possible while still serving the book's objective — to teach the subject.

For starters, we can strive for humor, variety, clarity, and engaging writing. The enterprise will not likely support the extended charm of a Hazlitt essay or the quirkiness of a Vonnegut novel — assuming I had the talent to achieve either, in which case I'd probably be in a different line of work — but a casebook is a book, after all, and should have, well, personality, an authorial presence in so far as possible. So you may find the tone or voice in my contributions to this volume (and even some of the editorial selections) different from what you're accustomed to encountering in the genre. That's what makes the book mine.

The legal profession is a culture of storytellers and stories. Harrison Tweed, a president of the Association of the Bar of the City of New York, once said:

I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind.

These words are in fact inscribed on a wall at the Association's headquarters. As a young lawyer, I thought Mr. Tweed was a little over the top, if not downright sanctimonious, in making so grandiose a claim. At that time in my life, I was inclined to agree with the character in George Bernard Shaw's play *The Doctor's Dilemma* who said "all professions are conspiracies against the laity." To some extent, I still find Tweed excessive, though not quite as passionately as when I was starting out, and Shaw apt, even if hyperbolic.

And yet. And yet Tweed has a point. The profession and its members *are* fascinating to study and its stories *are* fascinating to hear. Like any culture, understanding it requires density. We must know a thousand small things about life within the society of lawyers, not merely two or three big things, if we are going to understand it truly. While this book is not a sociological study of lawyers or of legal institutions, I have tried to incorporate current events in the materials and to offer you note cases — little stories, really — exemplifying multiple variations on particular themes. I believe that these will make the culture of law practice more real for you and thereby better help you understand the rules that define it.

Finally, I invite your views on the book. What was dull? What worked well? How can the book be improved? Have you encountered a story somewhere (true or fiction) that you think nicely highlights an issue? You can reach me in several ways. By snailmail at NYU School of Law, New York, NY 10012. By fax at (212) 995-4658. Send e-mail to stephen.gillers@nyu.edu. All comments will be acknowledged.

Stephen Gillers
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This sixth edition builds on the first five and, therefore, benefits from the work of New York University School of Law students whose energies contributed to this volume's ancestors. They are: Leonard A. Ho and David F. Levine, class of 1999 (fifth edition); Julie C. Brain and Maria Lopotukhin, class of 1995 and 1996 respectively (fourth edition); Mary E. McDonald, class of 1993 (third edition); Laura Gilbert and Barbara Quakenbos, class of 1990 and 1988 respectively (second edition); and Patricia C. Hayashi, class of 1983, Virginia L. Richards, class of 1986, and Susan A. Waxenberg, class of 1982 (first edition). My gratitude to each of these students continues undiluted.

My debt to members of the professional staff of the NYU School of Law Library also continues. Anyone who produces a book like this knows how important librarians are. Exceptionally useful assistance to this and prior editions was repeatedly available from Carol Alpert, Ronald Brown, Elizabeth Evans, Gretchen Feltes, Leslie Rich, and Jay Shuman.

My colleague Norman Dorsen was my co-author on the first two editions of this casebook. Other demands on his time caused Professor Dorsen to trust succeeding editions to my sole care. Nevertheless, in countless ways this edition, like the third, fourth and fifth, benefits from Professor Dorsen's early work.

My understanding of the issues raised in the following pages is greatly enhanced by conversations with one person whom I mention

last but am grateful to most: Barbara S. Gillers, Esq., whose professional work on lawyer regulation puts her daily on the front lines of most of the developing issues recounted here.

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Stephen Gillers

A Word About Case Editing

No case is reprinted unedited. Omissions are identified with ellipses or brackets, but there is no identification where only case citations or other authorities are deleted. Case citations do not include subsequent history except that United States Supreme Court denials of certiorari are indicated for principal cases.

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